

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CYTYC CORPORATION,)
)
Applicant,)
)
v.)
)
DEKA PRODUCTS LIMITED)
PARTNERSHIP)
)
Respondent.)
)

05 10932 WGY

Civil Action No. 05-10932-WGY

AMOUNT \$	<u>350,000</u>
SUMMONS ISSUED	—
LOCAL RULE 4.1	—
WAIVER FORM	—
MCF ISSUED	—
BY DPTY. CLK.	<u>MJ</u>
DATE	<u>5/5/05</u>

MAGISTRATE JUDGE JGO

**CYTYC CORPORATION'S APPLICATION TO VACATE
ARBITRATION AWARD PURSUANT TO 9 U.S.C. § 10**

Pursuant to 9 U.S.C. §§ 6 & 10, Cytac Corporation (“Cytac”) respectfully applies for an order from this Court vacating the arbitration award rendered on March 7, 2005 and April 26, 2005 by a panel in Massachusetts (the “Award”).

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), as Cytac is a Delaware corporation headquartered in Massachusetts, Respondent is a limited partnership headquartered in New Hampshire, and the amount in controversy exceeds \$75,000.00.

2. In addition, the Court has personal jurisdiction over Respondent to vacate the Award because Respondent arbitrated the underlying dispute, and also conducts significant business, in this judicial district.

3. An arbitration panel’s discretion is broad, but it is not limitless. The First Circuit has established clear boundaries for the exercise of arbitral discretion and has mandated that awards exceeding those limits not be enforced. In this case, the arbitration panel has strayed far beyond the boundaries that should have guided their adjudication.

4. *First*, the panel manifestly disregarded governing law by: (1) ignoring New Hampshire statutes that **must** be considered when construing the Agreement , and (2) disregarding statutory provisions dictating how interest is to be calculated.

5. *Second*, the panels' ruling is unfounded in reason and fact and is based upon an illogical construction of the language of the Agreement.

6. *Third*, the panel's ruling is divorced from the language of the Agreement because the panel made its award based on what, in hindsight, it believed would have been fair in light of subsequent commercial events; the Award is plainly **not** based on the language of the Agreement actually bargained for and agreed to by the parties in 1993.

7. *Fourth*, the panel exceeded its authority by deciding issues of patent law that were never submitted to arbitration and that do not arise out of, or relate to, to the Agreement.

8. *Finally*, the panel refused to consider material evidence concerning the propriety of deducting commissions paid by Cytac from the royalty base calculations.

9. Cytac requests an oral hearing of this matter before the Court.

10. For these reasons, and those set forth in the accompanying Memorandum In Support Of Cytac's Application To Vacate Arbitration Award and the Declaration Of Marc A. Cohn submitted herewith, Cytac respectfully requests that the Court enters an order that:

- (i) the Award be vacated *in toto* and the parties' dispute returned to arbitration with the instruction that New Hampshire contract law be followed;
- (ii) the Award be vacated to the extent it awarded interest and the parties' dispute returned to arbitration with the instruction that New Hampshire interest law be followed;
- (iii) the Award be vacated to the extent it made findings on the scope of any patents;
- (iv) the Award be vacated to the extent it found that Cytac's deduction of commissions were improper and the parties dispute returned to arbitration

with the instruction that the panel consider the material evidence on the meaning of the deductions provisions in the 1993 Agreement.

Respectfully submitted,

CYTYC CORPORATION,

By its attorneys



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Marc A. Cohn
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Washington, D.C. 20004
(202) 383-6858

Dated: May ___, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CYTYC Corporation v. DEKA Products Limited Partnership

1. Title of case (name of first party on each side only)

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.

II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, *Also complete AO 120 or AO 121 for patent, trademark or copyright cases
740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950.

III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.

IV. 220, 422, 423, 430, 460, 480, 490, 510, 530, 610, 620, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.

V. 150, 152, 153.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO 7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).YES NO A. If yes, in which division do all of the non-governmental parties reside?Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Lisa J. Pirozzolo, Esq.

ADDRESS Wilmer Cutler Pickering Hale and Dorr LLP, 60 State St., Boston, MA 02109

TELEPHONE NO. 617-526-6000

(CategoryForm.wpd - 5/2/05)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Applicant

CYTYC Corporation

DEFENDANTS Respondents

DEKA Products Limited Partnership

(b) County of Residence of First Listed Plaintiff Middlesex

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant New Hampshire

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (Known) **05 10932 WGY**

(c) Attorney's (Firm Name, Address, and Telephone Number)

Wilmer Cutler Pickering Hale and Dorr LLP
60 State St., Boston, MA 02109
Lisa Pirozzolo, Esq. BBO #561922

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	PTF	DEF	Citizen of Another State	PTF	DEF
<input type="checkbox"/> 1	<input type="checkbox"/> 1	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 2	<input type="checkbox"/> 4
					<input checked="" type="checkbox"/> 5
					<input checked="" type="checkbox"/> 5

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 410 Agriculture	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 450 Commerce	<input type="checkbox"/> 440 Deportation
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 480 Cable/Sat TV	<input type="checkbox"/> 490 Other Contract
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 510 Selective Service	<input type="checkbox"/> 810 Occupational Safety/Health
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 850 Securities/Commodities Exchange	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 390 Other Personal Injury	<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 450 Commerce	<input type="checkbox"/> 450 Commerce
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	SOCIAL SECURITY	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 520 Habeas Corpus:	<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 510 Selective Service	<input type="checkbox"/> 510 Selective Service
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 810 Occupational Safety/Health	<input type="checkbox"/> 810 Occupational Safety/Health
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 850 Securities/Commodities Exchange	<input type="checkbox"/> 850 Securities/Commodities Exchange
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 875 Customer Challenge
			<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 12 USC 3410
			<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
			<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 891 Agricultural Acts
			<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 892 Economic Stabilization Act
			<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 893 Environmental Matters
			<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 894 Energy Allocation Act
			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 895 Freedom of Information Act
			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
			<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 950 Constitutionality of State Statutes
			<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 9 U.S.C. Sect. 10
			<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
			<input type="checkbox"/> 871 IRS- Third Party 26 USC 7609	
FEDERAL TAX SUITS				
			<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
			<input type="checkbox"/> 871 IRS- Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation

Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause: Application to vacate Arbitration award pursuant to 9 U.S.C. Sect. 10

VII. REQUESTED IN COMPLAINT:

 CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE:

May 5, 2005

FOR OFFICE USE ONLY

SIGNATURE OF ATTORNEY OF RECORD

Lisa Pirozzolo

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE